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Chief Counsel

William Leahy

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## CAFL PROGRAM

## CAFL Co-Directors

Susan Dillard

Amy Karp (interim)

## CAFL Staff Attorneys

Andrew Cohen

Amy Karp

Appellate Assignment & Certification Coordinator

[Position Vacant]

Several amendments to the Massachusetts Rules of Appellate Procedure went into effect on September 1, 1999. Many of these rules are designed specifically to change existing appellate practice in CAFL cases. The major rules changes are as follows:

Notice of Appeal:

Notices of appeal from any final judgment (care and protection, 23C, guardianship, decree dispensing with consent under 210 or 303) must be filed within **30 days** of entry of the adjudication, order, decree or judgment. *Rule 4(a) and G.L. c. 119, § 27.*

Notices of appeal filed by adult (parent) clients must be **signed** by the client. The clerk will not accept a notice of appeal filed without the requisite signature. Notices of appeal filed by child clients need not be signed by the client. However, if your parent client is a minor, he or she must sign the notice of appeal. *Rule 3(c).*

Cassettes/Transcripts:

The appellant must, on the day the notice of appeal is filed, file a motion for “reasonable costs associated with the appeal.” *Rule 3(f)*. The appellant does not need to order cassettes; the clerk’s office is required to do all necessary ordering and take any other steps necessary to obtain the transcripts. *Rule 8(b)(5)*. We recommend, especially in cases where the trial has been spread out over many days and/or in

cases where the appellant needs a transcript of hearings that were not part of the trial (e.g., motion in limine, abuse of discretion, etc.), that appellate counsel provide the clerk's office with a letter specifying the dates and hearings that counsel wants transcribed. The clerk's office may not "adapt" to this rule change quickly. We therefore recommend that you bring a copy of this rule to the clerk's office if you are in a position to request specific transcripts or enclose a copy of the rule with your letter.

Assignment of Appellate Counsel:

Trial counsel no longer files a “motion to withdraw as appellate counsel” in order to trigger CPCS’ appointment of appellate counsel. Now, trial counsel (if not appellate certified) must file a “motion to appoint appellate counsel.” This will make clear that trial counsel remains as counsel for all matters in the trial court. *Rule 3(f)*. Trial counsel still acts as appellate counsel until appellate counsel files an appearance. This makes it especially important for you to file an appearance in the trial court as appellate counsel for your client.

# WELCOME TO MARGARET WINCHESTER

As many of you know, Kathryn White left the CPCS Children & Family Law ("CAFL") Program this summer to take a position as Associate Justice of the Juvenile Court. The CAFL Program is very pleased to announce that Margaret Winchester has been chosen as the new CAFL Co-Director. Margaret will be joining the Program in early November, 1999. She currently serves

as the Regional Coordinator for Northern Worcester County. She is also a member of the CAFL appellate panel and has served for a number of years as an appellate mentor.

*We will be sending you a supplement to the CAFL Appellate Training written materials in late October. Please let us know if there is anything you believe we should add to this or any subsequent supplement.*

*Please call us if your case is granted oral argument. We are available to "moot court" your oral argument with you if you would like assistance preparing your case.*

## 1999 PUBLISHED CHILD WELFARE DECISIONS

Some of the child welfare cases which warranted a published decision during the first nine months of 1999 (with the issues raised therein in parentheses) are listed below:

Adoption of Duval, 46 Mass. App. Ct. 916 (1999) (stay pending appeal);  
Adoption of Helen, 429 Mass. 859 (1999) (post-termination visitation; review and redetermination; stay pending appeal);  
Adoption of Vito, 47 Mass. App. Ct. 349 (1999) (court's authority to order post-adoption visits);  
Care and Protection of Ian, 46 Mass. App. Ct. 615 (1999) (visitation; shift of burden of proof);  
Commonwealth v. White, 429 Mass. 258 (1999) (timeliness of notice of appeal; enlargements of time period);  
Degrenier v. Reid, \_\_\_ Mass. App. Ct. \_\_\_ (Sept. 23, 1999) (post-adoption sibling visitation);  
E.N.O. v. L.M.M., 429 Mass. 824 (1999) (visitation; rights of *de facto* parent; limitations on parental rights); and  
Youmans v. Ramos, 429 Mass. 774 (1999) (visitation; rights of *de facto* parents; limitations

on parental rights).

### Coming soon:

The SJC has accepted Adoption of Lars, 46 Mass. App. Ct. 30 (1998), for further appellate review. Briefs have been filed; oral argument is scheduled for December. Lars should determine the extent of the probate court's equitable power to order post-adoption contact between children and birth parents.

DSS has also sought further appellate review in Adoption of Vito, above, which also addresses the court's power to order post-adoption contact. In Lars, there was no identified pre-adoptive parent. In Vito, there was an identified pre-adoptive parent who objected to court-ordered visitation. As of the printing of this bulletin, there has been no action by the SJC on DSS' petition in Vito.

## ISSUES AFFECTING CAFL APPELLATE PANEL MEMBERS

### New Manual for Assigned Counsel: Performance Standards/Malpractice Insurance

CPCS has revised and mailed to all counsel a new Manual for Assigned Counsel. We strongly recommend that you review the new Manual thoroughly. The new Manual contains several new billing procedures as well as new performance standards for both CAFL trial and appellate counsel. The new CAFL performance standards feature several important standards governing the representation of children, including meeting with child clients and determining their positions at the appellate level. The new Manual is currently in effect, and you are responsible for representing your appellate clients in accordance with the rules set forth in the Manual and with the new CAFL performance standards. Please note that the new Manual requires that all CPCS-certified attorneys — includ-

ing CAFL attorneys — have malpractice insurance in effect by January 1, 1999

### Canteen Accounts

An affidavit of indigency is no longer sufficient support, in and of itself, for inmates to secure a waiver of the docketing fee. Judge Perretta is now requiring canteen accounts for inmates before ruling on a request to waive the docketing fee. Judge Perretta has denied motions to waive the docketing fee where the inmate has sufficient funds in the canteen account statements to pay the fee. She has also found that a client is partially indigent and ordered the client to pay part of the fee from the canteen account.

## SJC STYLE MANUAL / BLUEBOOK

The Office of the Reporter of Decisions of the SJC (the "Reporter") has issued and made available a style manual to provide guidelines for preparing appellate briefs. The style manual sets forth rules of the SJC for writing style, abbreviations and case citations, and provides other practical information. The style manual is offered free of charge by the Reporter and may be obtained by calling (617) 557-1030. The style manual provides that any citation

forms not covered therein must conform to the "Bluebook." Bluebooks may be ordered directly from the publisher at: The Harvard Law Review Association, Gannett House, 1511 Massachusetts Avenue, Cambridge, MA 02138, (617) 495-7888. The cost is \$9.00, pre-payment required (by check).

## STAYS PENDING APPEAL ARE CRUCIAL

Counsel for appellants must make sure that a stay pending appeal of the decree dispensing with consent is in effect. A stay is necessary to preserve your client's appellate rights.

A child can be adopted pursuant to c. 210, § 6 once a decree dispensing with consent has been entered pursuant to c. 210, § 3 or c. 119, § 26/303. Although c. 215, § 22 provides for an automatic stay of a decree entered in probate court pending appeal (including, presumably, a c. 210, § 3 decree), there is no automatic stay of a c. 119, § 26/303 decree entered in juvenile court. The vast majority of "termination" cases are now brought in juvenile court, rather than in probate court.

In past practice, the absence of an automatic stay for a c. 119, § 26 order was of little concern. Prior to the enactment of 1992 Mass. Acts 303, DSS could not dispense with a parent's consent in a c. 119 action, and there was rarely the need for a stay pending appeal of a care and protection adjudication. Also, until recently, most "termination" cases were brought in probate court. As a result, DSS policy used to be to refrain from filing an adoption petition until the appeal of a "termination" decree was resolved. Unfortunately, this is *no longer* DSS' practice.

DSS now seems to take the position that, absent a stay pending appeal, it is free to pursue adoption of the subject children. Even if DSS does not actively seek to have children adopted pending appeal, the adoption may take place "by accident." In two recent cases, through failure of communication between the DSS attorney and the adoption worker, children were adopted pending appeal. In another case,

Adoption of Duval, 46 Mass. App. Ct. 916 (1999), DSS rushed to have the children adopted as soon as an Appeals Court single justice denied the parents' motion for a stay.

Adoption of the child pending appeal is not just inconvenient. It may moot the appeal. Once the adoption decree is entered, there is likely no way to have any meaningful appellate review of the termination trial. The only way to prevent the mooting of your client's appeal is to obtain a stay pending appeal pursuant to Rule 6 of the Massachusetts Rules of Appellate Procedure.

It is trial counsel's responsibility to obtain a stay pending appeal. However, trial counsel may not have done so prior to your assignment as appellate counsel (or, trial counsel may have unsuccessfully moved for a stay in the trial court and failed to seek a stay from the Appeals Court). If no stay is in place in your appeal, we strongly suggest that you file a motion for stay pending appeal on your client's behalf in the trial court or, if such motion was already unsuccessful, before a single justice of the Appeals Court. Your efforts may be more successful than those of trial counsel.

Single justice motions for stay pending appeal are fairly straightforward. If you would like a package containing a sample motion and related pleadings, kindly contact Andy Cohen.

*DSS may press forward with an adoption during the course of your appeal unless you obtain a stay of the decree dispensing with consent.*

## WITHDRAWING AS APPELLATE COUNSEL

If you need to withdraw as appellate counsel, please contact the CAFL office as soon as practicable. We will assign another attorney to re-

place you. You will then be able to file your motion to withdraw together with the new appellate attorney's notice of appearance.

*Don't forget to send us each brief you file (or, if you are not going to file a brief, a memo indicating the reason the case closed without briefing).*

## DO YOU WANT MORE WORK?

If you are seeking additional assignments, kindly contact Andy Cohen or Susan Dillard. We will match you with an assignment as soon as possible. If you have a mentor, we may need to clear a new assignment with your mentor before sending you a new appeal.

Please do not forget to send us copies of all briefs that you file. If you close a case without briefing, kindly send us a note indicating that

the appeal is closed and the reason for such closure (e.g., client disappeared before docketing, client wished to drop appeal, case settled, etc.). If you have not done so in a while, kindly send us a note indicating the status of your recent appeals.

Committee for Public  
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**We're on the Web:**  
[www.state.ma.us/cpcs/cafl](http://www.state.ma.us/cpcs/cafl)

*Address Correction Requested*

## Children & Family Law Appellate Bulletin

# WE ARE HERE TO HELP YOU . . .

### New Fax Number

We have a new fax number: (617) 988-8455.

### Need Assistance?

If you have any substantive questions about your appeal and represent a parent, please contact either Susan Dillard at (617) 988-8307 or Andy Cohen at (617) 988-8310. If you represent a child, please contact Amy Karp at (617) 988-8382.

If you have any questions about an appellate assignment or you need the names or telephone numbers of trial counsel or other appellate counsel, please contact either Susan or Andy.

### Future Bulletins

This bulletin is to disseminate information about appellate practice to the attorneys who are certified to handle CAFL appeals. We welcome your ideas and encourage you to call us at any time to report on your appeal or share a practice tip or any experience you have had from which others may learn. If you have any information that you would like us to add to the

next bulletin, feel free to contact Susan or Andy.

### Appellate Assignment Coordinator

As many of you know, Beth Doherty has left the position of Certification & Appellate Assignment Coordinator for a position in the CPCS human resources department. We wish Beth well in her new position. The Coordinator position is currently open. We ask for your patience while Susan and Andy attempt to fill in for Beth until a new Coordinator is hired.

### Problem with trial counsel?

Trial counsel is required, pursuant to Trial Performance Standard 7.1(d), to provide appellate counsel with copies of exhibits and other paperwork upon the request of appellate counsel. If you are having communication difficulties with trial counsel, please contact the CAFL office. We are happy to mediate any disputes and explain to all attorneys involved the roles of trial and appellate counsel.

